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Nos. 82-5279 and 82-5331

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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ARTHUR DIXSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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JAMES LEE HINTON, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether petitioners, officers of a nonprofit urban development corporation administering and expending federal housing rehabilitation grants, were "person[s] acting for or on behalf of the United States, or any department, agency or branch of Government thereof, * * * in any official function, under or by authority of any such department, agency, or branch of Government" (18 U.S.C. 201(a)), and were therefore correctly found guilty of violating the federal bribery statute (18 U.S.C. 201(c)) for accepting payments in return for letting rehabilitation contracts.

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# In the Supreme Court of the United States

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ARTHUR DIXSON, PETITIONER

*v.*

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JAMES LEE HINTON, PETITIONER

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UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (J.A. 75-84)[1] is reported at 683 F.2d 195.

### JURISDICTION

The judgment of the court of appeals was entered on July 8, 1982. The petition for a writ of certiorari in No. 82-5279 was filed on August 24, 1982, and the petition in No. 82-5331 was filed on August 31, 1982. Both petitions for a

[1] "J.A." refers to the joint appendix filed in this Court.

writ of certiorari were granted on December 13, 1982 (J.A. 85-86). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTE INVOLVED

18 U.S.C. 201 provides, in pertinent part:

> (a) For the purpose of this section: "public official" means Member of Congress, the Delegate from the District of Columbia, or Resident Commisioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;
>
> * * * * *
>
> (c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
>
> (1) being influenced in his performance of any official act;
>
> * * * * *
>
> Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

## STATEMENT

Petitioners were indicted in the United States District Court for the Central District of Illinois on eleven counts of soliciting and receiving money in exchange for the award of housing rehabilitation contracts funded by the United States Department of Housing and Urban Development (HUD), in violation of 18 U.S.C. 201(c)(1). Following a jury trial, petitioners were convicted as charged and each

was sentenced to a term of 7½ years' imprisonment to be followed by three years' probation (J.A. 3-8, 23, 24).[2]

1. The Housing and Community Development Act of 1974, 42 U.S.C. (& Supp. IV) 5301 *et seq.*, provides federal funding to state and local governments for "the development of viable urban communities." 42 U.S.C. (& Supp. IV) 5301(c). The Act gives the Secretary of Housing and Urban Development power to dispense community development block grants to be used for specified activities (42 U.S.C. (& Supp. IV) 5305), including rehabilitation of residential structures and related public works projects (J.A. 25-26, 31-32). The Act authorizes state and local governments to designate community associations and other entities approved by the Secretary to be administrators of the grant funds (42 U.S.C. (& Supp. IV) 5302(a), (c)). Regulations promulgated by the Secretary permit state and local governments to delegate the administration of grant funds to neighborhood-based, nonprofit corporations (24 C.F.R. 570.204).

The Act calls for substantial federal supervision of the local governments and nonprofit corporations responsible for the administration of grant funds (J.A. 78-79). It requires the submission of a comprehensive three-year community development plan, as well as implementation and housing assistance plans, prior to the award of funds (42 U.S.C. (& Supp. IV) 5304); and it describes in detail the activities that are eligible for funding under community development

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[2] Petitioner Hinton was charged in Counts I-VI and VIII-XI with soliciting and receiving bribes in violation of 18 U.S.C. 201(c). He was sentenced to 7½ years' imprisonment on Counts I-VI, to be followed by three years' probation on Counts VIII-XI (J.A. 3-8, 24). Petitioner Dixson was charged in Counts I-VII, X and XI with soliciting and receiving bribes in violation of 18 U.S.C. 201(c), and was sentenced to 7½ years' imprisonment on Counts I-VII, to be followed by three years' probation on Counts X and XI (J.A. 3-8, 23). Execution of sentence was suspended pending appeal (J.A. 23, 24).

plans.[3] 42 U.S.C. (& Supp. IV) 5305. Further, there are extensive HUD regulations governing community development block grant procedures, program design, management, and administration. See generally 24 C.F.R. Part 570. Section 570.204, for example, governs eligible activities by private nonprofit entities.[4] Other regulations govern the procurement of services and materials by grantees and subgrantees (24 C.F.R. 570.507), and set forth the records and reports that must be prepared and made available for HUD inspection (24 C.F.R. 570.900-570.913).[5] The Secretary of HUD or the Comptroller General of the United States may examine and audit all books, accounts, records, reports, files or other papers of grantees or subgrantees. 42 U.S.C. (Supp. IV) 5304(d); 24 C.F.R. 570.509.

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[3] The Act, *inter alia*, authorizes grant funds to be used for the rehabilitation of blighted or deteriorating public facilities, the construction of centers for the handicapped, the clearance, demolition, removal and rehabilitation of buildings and improvements, and the financing of rehabilitation efforts on privately owned properties when incidental to other activities. 42 U.S.C. (& Supp. IV) 5305.

[4] Private nonprofit entities may acquire and rehabilitate blighted or deteriorating public facilities, construct centers for the handicapped, rehabilitate public and private residential structures, and finance the rehabilitation of privately owned structures. 24 C.F.R. 570.204(b). See also 24 C.F.R. 570.201-570.203.

[5] 24 C.F.R. 570.900 sets forth "performance standards" against which the Secretary of HUD measures a grantee's or subgrantee's compliance with the specific requirements of the Act and its implementing regulations. 24 C.F.R. 570.905 requires preparation of financial management reports, relocation and acquisition reports, equal opportunity reports, and any other report required by the Secretary. Other regulations prescribe how these reports will be maintained by grantees and examined by HUD. 24 C.F.R. 570.907-570.909. Following agency review of these reports to determine whether a grantee or subgrantee "has carried out a program substantially as described in its application" in compliance with the "requirements of the Act" and "other applicable laws and regulations" (24 C.F.R. 570.909(a)), HUD may take corrective and remedial actions that include seeking reimbursement for any funds improperly expended, reducing or withdrawing a grant, or referring a matter to the Attorney General for appropriate mandatory or injunctive relief. 24 C.F.R. 570.910-570.913.

In addition to these general reporting and oversight requirements, a broad range of substantive federal laws govern applicants for funds under the Housing and Community Development Act of 1974. The chief executive officer of a grantee must, for example, consent to "assume the status of a responsible Federal official under the National Environmental Protection Act of 1969 [42 U.S.C. 4321 *et seq.*]," and is required to accept federal jurisdiction "for the purpose and enforcement of his responsibilities as such an official." 42 U.S.C. (Supp. IV) 5304(h)(3)(D). Fund recipients are required to comply with the provisions of the Davis-Bacon Act (40 U.S.C. 276a to 276a-5),[6] and are prohibited from denying anyone the benefits of participation in a housing program on the basis of race, color, national origin, or sex. 42 U.S.C. 5309, 5310. Regulations promulgated by the Secretary of HUD require grantees and subgrantees to comply with the Archeological and Historic Preservation Act of 1974 (Pub. L. No. 93-291, 88 Stat. 174 *et seq.*), the Architectural Barriers Act of 1968 (42 U.S.C. 4151 *et seq.*), the Hatch Act (5 U.S.C. 7324), the Flood Disaster Protection Act of 1973 (Pub. L. No. 93-234, 87 Stat. 975), the Clean Air Act (42 U.S.C. 1857 *et seq.*), the Federal Water Pollution Control Act (33 U.S.C. (& Supp. IV) 1251 *et seq.*), and the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4831 *et seq.*). 24 C.F.R. 570.604-570.611. The Secretary of HUD is authorized to terminate, reduce, or limit funding for failure to comply with any of these requirements. 42 U.S.C. 5311.

2. Evidence presented at trial established that during 1979 and 1980, the City of Peoria, Illinois, received a community development block grant and a metro reallocated grant[7] totalling approximately $1.1 million from the United States Department of Housing and Urban Development. The grants were funded under the Housing and Community

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[6] The Davis Bacon Act, 40 U.S.C. 276a to 276a-5, requires government contractors to pay laborers and mechanics the prevailing wage rate in their particular locale.

[7] Metro reallocated grants are paid out of funds appropriated for, but not utilized by, the community development block grant program (J.A. 26).

Development Act of 1974. In accordance with the Act (42 U.S.C. (& Supp. IV) 5302(a), (c)) and its implementing regulations (24 C.F.R. 570.204), the city contracted with a community-based, not-for-profit corporation, United Neighborhoods, Inc. (UNI), to administer the funds awarded to Peoria (J.A. 26-27, 41-64, 70-72). UNI proposed to administer the funds in "a joint effort with the City of Peoria to achieve the common goals as set forth in the Housing and Community Development Act to insure safe, sanitary and decent housing for all people" (Gov't Exh. 19 at 2). Petitioner Dixson was the Executive Director of UNI, and petitioner Hinton was its Housing Rehabilitation Coordinator (J.A. 75).

The grant program administered by UNI was funded in its entirety by federal appropriations and federal funds paid all of UNI's costs and the salaries of its employees (including the salaries of the two petitioners) (42 U.S.C. (& Supp. IV) 5305(a)(13); 24 C.F.R. 570.206; J.A. 41-64, 70-72). UNI's responsibilities included soliciting bids and awarding contracts for the rehabilitation of eligible housing. At various stages during a rehabilitation project, participating contractors were paid by UNI with federal funds the corporation received from the city (J.A. 26-28, 31-35). UNI was thus a "subgrantee" of HUD funds, while the city of Peoria acted as a "liaison" between HUD and UNI (J.A. 27, 33).[8]

Two contractors who received housing rehabilitation contracts from UNI testified that petitioners Dixson and Hinton solicited money in exchange for awarding them con-

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[8] UNI accounted to the city for its expenditure of grant funds, and the city accounted to HUD for all federal funds received under the Housing and Community Development Act of 1974 (42 U.S.C. (Supp. IV) 5304(d); Gov't Exh. 13; J.A. 27, 32-33, 41-64, 70-72). Contrary to the assertion of petitioner Dixson (82-5279 Br. 5-6), the grants administered by UNI were audited in early 1980. The audit report, by Arthur Andersen & Co. and dated April 10, 1980, stated that the examination "was made in accordance with * * * provisions of the Department of Housing and Urban Development's *Audit Guide and Standards for Community Development Block Grant Recipients*" (Gov't Exh. 12 at 1).

tracts.[9] One contractor received rehabilitation contracts for ten homes after agreeing to pay petitioners ten percent of the amount of each contract. The contractor paid petitioners after cashing the checks he received periodically from UNI as rehabilitation work progressed (Tr. 139-145, 165-189, 220-223).[10] A second contractor was told by petitioner Dixson that he would receive a contract in return for a ten percent payment. Petitioners thereafter told the contractor which houses to bid on, recommended that the amount of one bid be lowered, and collected payment in cash after the contractor received his check from UNI (Tr. 77-83, 92, 95, 100, 104, 106). The bribes solicited and received by petitioners in this manner totalled $42,694.03 (Tr. 81-83, 92, 95, 173-177; Gov't Exhs. 1-11, 23).[11]

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[9] The Housing Committee of UNI was responsible for awarding contracts to successful bidders. In spite of the committee's formal responsibility for this function, however, contracts were awarded without committee approval (Tr. 226-228; J.A. 39). Petitioner Hinton in fact told one contractor that submitting the bids to the Housing Committee was just a formality (Tr. 79, 106).

[10] All payments to petitioners were made in cash in various locations, such as in the men's restroom and underneath the fire escape at UNI headquarters, in petitioner Dixson's house, in petitioner Hinton's apartment, and in the parking lot outside a bank where a contractor had just cashed a check drawn on UNI's account (Tr. 184, 190).

[11] UNI's amended grant agreement with the City of Peoria expressly requires compliance with the Copeland Anti-Kickback Act, 18 U.S.C. 874 (J.A. 71). That statute provides as follows (18 U.S.C. 874):

> Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion, or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Although the express wording of the statute would seem to reach the conduct of petitioners in this case, the statute has been restrictively construed. In *United States* v. *Carbone*, 327 U.S. 633, 637 (1946), this Court found that the statute was designed to protect the wages that laborers are entitled to receive under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, reasoning that the statute must be "read and applied in light of the evils which gave rise to [it] and the aims which the propo-

At the conclusion of the evidence, the trial court instructed the jury that the government was required to prove "[t]hree essential elements" under 18 U.S.C. 201(c) (J.A. 40). First, the government must show that the petitioners had directly or indirectly solicited, exacted, accepted, or agreed to receive a sum of money; second, that they had done this "corruptly while a public official;" and third, that they had performed the proscribed "acts with the intent to be influenced in their performance of an official act in respect to the awarding of housing rehabilitation contracts" (J.A. 40). The court instructed the jury that 18 U.S.C. 201(a) "defines the term 'public official' to include an officer or employee or person acting for or on behalf of the United States in any official function, under or by authority of any department, agency or branch of government" (J.A. 40). "Official act" was likewise defined by the court as "any decision or action on any question, matter, proceeding or controversy which may at any time be pending or which may by law be brought before any public official in his official capacity" (*ibid.*). The jury found petitioners guilty as charged.

3. The court of appeals unanimously affirmed petitioners' convictions (J.A. 75-84). The court rejected petitioners' contention that they were not "public officials" within the meaning of 18 U.S.C. 201(a). It held that the "substantial federal supervision" of UNI's administration of community development block grant funds together with petitioners' "positions within the program" established that they were persons "acting for or on behalf of the United States or any department, agency, or branch of Government thereof" (J.A. 78-80).

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nents sought to achieve." Thus, the statute applies to laborers on federally financed construction projects, to prevent kickbacks of a portion of their wages to their employers. 327 U.S. at 638-642. The First Circuit has concluded that the statute's application is *limited* to this purpose, holding that the statute cannot be applied to payments made by contractors for the award of housing contracts under a HUD rehabilitation program. *Slater* v. *United States*, 562 F.2d 58, 59-62 (1st Cir. 1976).

The court rejected petitioners' assertion that 18 U.S.C. 201(a) reaches only those persons employed by the federal government (J.A. 80). The court held that "[t]he extent of federal involvement [in the community development block grant program] is such that [petitioners] were acting on behalf of the United States in their administration of the federal funds under the program" (J.A. 79). The court noted that although "the federal funds flow from the local sponsor to the recipient of a contract rather than directly from the agency * * * the purpose of this procedure [is] to streamline the funding process rather than to abdicate federal control over the substantive aspects of the program" (*ibid.*). Moreover, "[t]he salaries of [petitioners] and the entire cost of the program they administered were funded by the federal government for federal objectives," and petitioners were therefore "acting as federal agents in the sense of having discretion in administering the expenditure of federal funds" (J.A. 80). The court concluded that because petitioners "had the authority and power to influence or control the dispersal of federal funds on behalf of HUD," they qualified "as 'public officials' within the meaning of section 201(c)" (J.A. 81-82, footnote omitted).

The court of appeals found support for its holding in two earlier Seventh Circuit decisions: *United States* v. *Mosley*, 659 F.2d 812 (1981),[12] and *United States* v. *Griffin*, 401 F. Supp. 1222 (S.D. Ind. 1975), aff'd without opinion *sub. nom. United States* v. *Metro Management Corp.*, 541 F.2d

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[12] In *Mosley*, the court upheld the conviction under 18 U.S.C. 201(g) of an intake and eligibility officer employed by the State of Illinois under the Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. 801 *et seq.* The defendant in *Mosley* solicited payments from applicants in return for federally funded CETA jobs (659 F.2d at 813). The *Mosley* court relied upon the extensive federal supervision of the CETA program (*id.* at 814-815) and noted that the defendant's "referals were successful in obtaining jobs for those who paid the bribe" (*id.* at 816). The defendant, therefore, was "authorizing the expenditure of federal funds *himself*" (*ibid.*, emphasis in original). The court held that the fact that the defendant was a state employee did not prevent application of 18 U.S.C. 201(g) to his misdeeds because he was "acting 'on behalf' of the federal Government" within the meaning of the statute (659 F.2d at 816).

284 (1976).[13] The court of appeals distinguished two decisions of the Second Circuit (*United States* v. *Loschiavo*, 531 F.2d 659 (1976), and *United States* v. *Del Toro*, 513 F.2d 656, cert. denied, 423 U.S. 826 (1975)), concluding that the federal involvement in the program at issue in this case "differs significantly" from the housing program examined in the Second Circuit cases (J.A. 78).

## SUMMARY OF ARGUMENT

1. Section 201(a) defines a "public official" as any "person acting for or on behalf of the United States * * * in any official function" (18 U.S.C. 201(a)). The plain language of the statute, therefore, refutes petitioners' argument that Congress limited Section 201(a) to persons having a "direct agency or contractual relationship" with the federal government (82-5331 Br. 7). To the contrary, the statute clearly extends to persons administering federally sponsored activities authorized by statute, regulation, contract, or agreement—whether or not those persons have some employment relationship with the United States. In the face of the sweeping language of Section 201(a), this Court should not construe the statute to exclude any person or conduct fairly encompassed by it (*Lewis* v. *United States*, 445 U.S. 55, 60-61 (1980); *United States* v. *Culbert*, 435 U.S. 371, 373 (1978)).

2. The legislative history of 18 U.S.C. 201(a) demonstrates that the statute reaches persons administering fed-

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[13] The court of appeals in *United States* v. *Metro Management Corp.*, *supra*, upheld the conviction under 18 U.S.C. 201(c) of a principal officer and agent of a corporation that had been awarded an area management broker contract by HUD. In return for a ten percent payment, the defendant had submitted bids on housing contracts to HUD for agency approval. The defendant had argued before the district court that because the bids were actually accepted by HUD, application of the federal bribery statute to him was improper. The district court rejected the argument, noting that the defendant was "enabled to exercise discretion to act for and on behalf of HUD in operating the system" (401 F. Supp. at 1230). The fact that the defedant was an employee of a private corporation "and not of the United States does not prevent him from acting as a 'public official' as defined in 18 U.S.C. § 201(a)" (401 F.Supp. at 1230).

erally sponsored and supervised programs. The scope of federal bribery law has expanded in step with the increasing size and complexity of the federal government. Whereas the first federal bribery statute proscribed only the bribery of judges (Act of Apr. 15, 1790, ch. 9, § 21, 1 Stat. 117), by 1948 Congress had enacted statutes that "embrace[d] all officers or persons acting on behalf of any independent agencies or Government-owned or controlled corporations" (H.R. Rep. No. 304, 80th Cong., 1st Sess. A14-A15 (1947)). The comprehensive bribery statute at issue in this case was enacted in 1962, and was expressly designed to include "within the statutory coverage those persons who perform activities for the Government" (H.R. Rep. No. 748, 87th Cong., 1st Sess. 17-18 (1961)). Congress, moreover, rejected proposed legislation that would have limited the coverage of 18 U.S.C. 201 solely to officers, agents, or employees of the United States (see, *e.g.*, H.R. 3411, 87th Cong., 1st Sess. (1961)). Congress, therefore, has asserted its intention in 18 U.S.C. 201(a) to deal comprehensively with bribery in connection with the administration of federal programs. It should not be required to graft new language onto the statute each time the growth of federal agencies and programs results in a new delegation of administrative duties to new sorts of persons "carrying on activities for or on behalf of the Government" (S. Rep. No. 2213, 87th Cong., 2d Sess. 8 (1962)).

Consistent with this legislative intent, most federal district and appellate courts have concluded that persons exercising powers authorized by federal statute, regulation, contract, or agreement as part of a federally sponsored, supervised, and funded program are "acting for or on behalf of the United States" within the meaning of Section 201(a). Courts have found that the federal bribery statute applies to the bribery of a federal reserve bank employee (*United States* v. *Hollingshead*, 672 F.2d 751 (9th Cir. 1982)), a state social service eligibility worker (*United States* v. *Mosley*, 659 F.2d 812 (7th Cir. 1981)), privately employed grain inspectors (*United States* v. *Kirby*, 587 F.2d 876 (7th Cir. 1978)), and private employees of the military post exchange system (*Harlow* v. *United States*, 301 F.2d 361 (5th

Cir.), cert. denied, 371 U.S. 814 (1962)). In light of these precedents, petitioners' responsibilities as administrators of a federally funded housing program plainly bring them within the purview of 18 U.S.C. 201(c). The Second Circuit cases giving the statute a woodenly restricted reading (*United States* v. *Del Toro*, 513 F.2d 656, cert. denied, 423 U.S. 826 (1975); *United States* v. *Loschiavo*, 531 F.2d 659 (1976)), are contrary to the weight of judicial authority and are inconsistent with the language and legislative history of 18 U.S.C. 201(a).

3. Extensive federal involvement in the housing program administered by petitioners compels the conclusion that they are "public officials" under 18 U.S.C. 201(a). UNI's housing rehabilitation program was not merely "a local project to accomplish local objectives" (82-5279 Br. 17), but rather was part of a nation-wide effort to achieve "essential national goals and objectives" (H.R. Rep. No. 93-1114, 93d Cong., 2d Sess. 6 (1974)). To insure that "nationally-established objectives are being met in a reasonable manner" (H.R. Rep. No. 93-1114, *supra*, at 8), Congress created extensive "executive oversight" of locally administered housing programs (S. Rep. No. 93-693, 93d Cong., 2d Sess. 55 (1974)). Thus, local housing development programs must comply with detailed federal planning, implementation and reporting requirements (42 U.S.C. (& Supp. IV) 5304, 5305), and are subject to a broad range of federal substantive laws (42 U.S.C. (& Supp. IV) 5304(h), 5309-5310). This extensive federal supervision demonstrates that the housing rehabilitation program operated by United Neighborhoods, Inc., was undeniably conducted "under or by authority of" a federal "department" within the meaning of Section 201(a). Petitioners' positions within that program, moreover, show that they were persons "acting for or on behalf of the United States" (18 U.S.C. 201(a)). Petitioners possessed and exercised the authority to award federal housing rehabilitation grants to contractors who paid them a ten percent bribe. The court of appeals was therefore correct in concluding that petitioners "were acting as federal agents in the sense of having discretion in administering the expenditure of federal funds" (J.A. 80).

4. The federal government has a strong and legitimate interest in prosecuting petitioners for their misuse of government funds. There is no reason why corruption in the dispensing of federal funds should be insulated from the application of federal criminal law solely because state and local officials are used as intermediaries in the distribution of those funds. Section 201(a) is cast in broad terms precisely in order to include all those "carrying on activities for or on behalf of the Government" (S. Rep. No. 2213, *supra*, at 8). Considerations of comity and federalism are therefore irrelevant here and do not point toward a restrictive interpretation of 18 U.S.C. 201(a). The statute's clear language gave petitioners ample warning that their conduct was prohibited, and application of the statute to that conduct would further its central purposes.

## ARGUMENT

### AS OFFICERS OF A QUASI-PUBLIC CORPORATION ADMINISTERING FEDERAL HOUSING REHABILITATION GRANTS, PETITIONERS ARE "PUBLIC OFFICIALS" WITHIN THE MEANING OF THE FEDERAL BRIBERY STATUTE, 18 U.S.C. 201(a)

Petitioners assert that they do not come within the purview of the federal bribery statute, 18 U.S.C. 201(a), because they were employees of United Neighborhoods, Inc., and lacked any employment relationship with the federal government (82-5279 Br. 11-13; 82-5331 Br. 7-8). This argument ignores the sweeping language of 18 U.S.C. 201(a), its legislative history, the extent of the federal involvement in the housing program administered by petitioners, and the strong interest of the federal government in prosecuting petitioners for their corrupt administration of government funds. A reasoned consideration of these factors compels affirmance of the decision below.

#### A. The Plain Language Of The Federal Bribery Statute Includes Petitioners Within Its Reach

This Court has repeatedly stated that the "starting point in every case involving the construction of a statute is the language itself." *Southeastern Community College* v.

*Davis*, 442 U.S. 397, 405 (1979), quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337-338 (1979). If "statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States* v. *Turkette*, 452 U.S. 576, 580 (1981); *Rubin* v. *United States*, 449 U.S. 424, 429-431 & n.8 (1981); *Lewis* v. *United States*, 445 U.S. 55, 60 (1980); *United States* v. *Naftalin*, 441 U.S 768, 772-774 (1979); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820). In this case, the plain language of 18 U.S.C. 201(a) refutes petitioners' argument that they are not public officials.

The federal bribery statute provides that it is a felony for "any * * * public official" to "directly or indirectly" ask, demand, exact, solicit, seek, accept, receive, or agree to receive "any thing of value" in return for being influenced in the performance of "any official act," or for committing a fraud on the United States or violating any official duty. 18 U.S.C. 201(c).[14] The statute broadly defines "public official" to include "an officer or employee or person acting for or on behalf of the United States, or any department, agency, or branch of Government thereof, in any official function, under or by authority of any such department, agency, or branch of Government." 18 U.S.C. 201(a).[15]

The federal bribery statute is remarkable because "[t]he statutory language is sweeping" (*Lewis* v. *United States*, *supra*, 445 U.S. at 60). Indeed, as the First Circuit noted in construing a direct predecessor to 18 U.S.C. 201(a), "it is quite striking how many broadening words are used in the statute." *Wilson* v. *United States*, 230 F.2d 521, 524,

[14] 18 U.S.C. 201(b) similarly makes it a crime for anyone to offer any thing of value to a public official with the intent of influencing any official act, aiding in the commission of a fraud on the United States, or inducing an act in violation of official duty.

[15] "Official act" is also expansively defined as including "any decision or action or any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official." 18 U.S.C. 201(a).

cert. denied, 351 U.S. 931 (1956). Congress included no limiting modifier in the statute to restrict bribery prosecutions to persons having an employment relationship with the federal government. To the contrary, the terms of the statute expressly reach any "officer *or* employee *or* person acting for or on behalf of the United States, or *any* department, agency, or branch of Government thereof, in *any* official function" (18 U.S.C. 201(a), emphasis added). These words "do not lend themselves to restrictive interpretation" (*United States* v. *Culbert*, 435 U.S. 371, 373 (1978)). In fact, it is hard to imagine how Congress could have expressed more vividly its intention to cover persons administering federal programs whether or not they have an employment relationship with the United States.

Petitioners claim that the term "public official" includes only those persons who "perform an official function for the Federal Government" (82-5279 Br. 14; see 82-5331 Br. 15). Assuming this test to be correct, petitioners plainly meet its requirements. As the court below found (J.A. 80), and as will be discussed later in more detail (*infra* pp. 33-36), petitioners were paid with federal funds and were administering a program completely funded by the federal government for federal objectives. Their positions as Executive Director and Housing Rehabilitation Coordinator of UNI clearly gave them "discretion in administering the expenditure of federal funds" (J.A. 80).[16] Although petitioners as-

[16] The fact that petitioners' job descriptions did not authorize them to grant rehabilitation contracts (82-5279 Br. 6; 82-5331 Br. 4) does not undermine the court of appeals' finding (J.A. 80) that they had discretion in the expenditure of federal funds. Indeed, without such discretion it is hard to think why petitioners would have been worth bribing. The evidence presented at trial clearly showed that "the contractors favored by [petitioners] were successful in their bids," and in their dealings with the contractors neither petitioner "displayed any aspect of hypobulia" (J.A. 80). Furthermore, petitioners' actual ability to award the rehabilitation contracts is immaterial to their culpability under 18 U.S.C. 201(c). "Neither the ability to perform nor the actual performance of some identifiable official act as *quid pro quo* is necessary for a violation of [the federal bribery] statute[ ]." *United States* v. *Evans*, 527 F.2d 455, 481 (5th Cir. 1978). Indeed, an official can be convicted for bribery even if he lacks the authority to perform the act

sert that they did not "perceive [themselves] as '* * * person[s] acting for or on behalf of the United States in an official function'" (82-5279 Br. 15), the contractors who paid petitioners ten percent of their rehabilitation contracts certainly "recognize[d] that the value [of dealing with petitioners was] not derived from [petitioners] personally," but rather from the "authority [petitioners] possess[ed]" as administrators of federal funds (82-5279 Br. 15). The contractors, in short, dealt with petitioners in their role as a "surrogate, a vicar, a deputy for the Federal Government" (82-5279 Br. 15).

"The clear purpose of the [federal bribery] statute is to protect the public from the evil consequences of corruption in the public service." *Kemler* v. *United States*, 133 F.2d 235, 238 (1st Cir. 1942). Section 201(a) should be construed broadly enough to accomplish that legislative end. *United States* v. *Evans*, 572 F.2d 455, 480 (5th Cir. 1978). Petitioner's direct responsibilities for the administration of HUD housing rehabilitation funds clearly render them "public officials" for purposes of the federal bribery statute. "Certainly, in the face of such sweeping language and the purpose it was designed to accomplish," there is no reason to construe the statute, as petitioners would, "to exclude any person or any conduct fairly within the broad statutory ambit." *Wilson* v. *United States*, *supra*, 230 F.2d at 524.

### B. The Legislative History And Judicial Construction Of 18 U.S.C. 201(a) Demonstrate That The Statute Encompasses Persons Administering Federally Funded And Supervised Programs

**The fundamental purpose of any bribery statute is to protect the integrity of government institutions. The federal law of bribery, therefore, has expanded gradually in scope in recognition of the growth of government and the concomitant increase in the number and sorts of persons performing official government functions. Federal courts, moreover, have given successive federal bribery statutes a broad reading "in order to accomplish the legislative**

for which the bribe was paid. *Ibid.*; *United States* v. *Birdsall*, 233 U.S. 223, 231-236 (1914).

purpose which they manifest." *United States* v. *Evans*, 572 F.2d 455, 480 (5th Cir. 1978).

1. In the seventeenth century, the common law crime of bribery extended only to the corruption of judges. 3 E. Coke, *Institutes of the Laws of England* 144, 147 (1628). By the nineteenth century[17] bribery had come to subsume corruption of "any public officer," whether or not a judicial officer, as well as bribery of voters and witnesses. See J. Stephen, *Digest of the Criminal Law* 85-87 (1877). See also 3 J. Stephen, *A History of the Criminal Law of England* 250-255 (1883); 1 J. Gabbett, *A Treatise on the Criminal Law* 163 (1843). Thus, although beginning on a "narrow base," the evolution of common law bribery demonstrated an "ever-expanding growth in recognition of an important social interest." R. Perkins, *Criminal Law* 468 (2d ed. 1969). See *id.* at 470-474; 1 W. Burdick, *The Law of Crime* 426-429 (1946).[18] Federal bribery law, as illustrated by the numerous bribery statutes enacted prior to 18 U.S.C. 201, has likewise experienced "ever-expanding growth" in recognition of the fact that "the essential objective of the bribery laws is to preserve the integrity of official action from direct and indirect corruption." Staff of House Comm. on the Judiciary, 85th Cong., 2d Sess., *Report on Federal Legislation* 70 (Comm. Print 1958) (hereinafter "*Staff Report*").

The first federal bribery statute, enacted in 1790 and reflecting the early common law, proscribed the giving of a bribe "to obtain or procure the opinion, judgment or decree of any judge or judges of the United States, in any suit,

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[17] Blackstone defined bribery in the eighteenth century as an offense involving a judge "or other person concerned in the administration of justice," and included the giver of the bribe as well as its recipient as an offender. 4 W. Blackstone, *Commentaries on the Laws of England* 139-140 (1765). Hawkins, writing after Blackstone, defined bribery to include not only the corruption of judges and other persons involved in the administration of justice, but also "the taking or giving of a reward for offices of a public nature." 1 W. Hawkins, *Pleas of the Crown* 311-313 (1777).

[18] See also W. Clark & W. Marshall, *A Treatise on the Law of Crimes* 1032-1034 (7th ed. 1967) ("It is not even necessary that the person bribed shall be a public officer. It is enough if the duty in the performance of which he is influenced is a public duty.")

controversy, matter or cause pending before him" (Act of Apr. 15, 1790, ch. 9, § 21, 1 Stat. 117). Some 63 years later, Congress expanded the reach of the law by prohibiting the bribery of "any member of the Senate or House of Representatives" as well as "any officer of the United States, or person holding any place of trust or profit, or discharging any official function under, or in connection with, any department of the Government of the United States" (Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 171).[19] By 1878, the scope of federal bribery law had been broadened further by the passage of statutes that outlawed the bribery of or the acceptance of bribes by "any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Goverment thereof" (Rev. Stat. 5451 (1878 ed.); Rev. Stat. 5501 (1878 ed.).[20] This language was reenacted in bribery statutes contained in the Criminal Code of 1909, ch. 321, §§ 39 and 117, 35 Stat. 1096, 1109.

In 1948, Congress extended still further the reach of federal bribery law by amending Sections 39 and 117 of the Criminal Code of 1909, 35 Stat. 1096, 1109, so that they "embrace[d] all officers or persons acting on behalf of any independent agencies or Government-owned or controlled corporations" (H.R. Rep. No. 304, 80th Cong., 1st Sess. A14-A15 (1947); H.R. Rep. No. 152 (Pt. 2), 79th Cong., 2d Sess. A12-A13 (1946)). Section 39 was amended to proscribe the giving of a bribe to "any * * * person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency" (Act of June 25, 1948, ch. 645, § 201, 62 Stat. 691), while Section 117 was amended to prohibit the acceptance of a bribe by such a

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[19] Other early statutes prohibited the acceptance of bribes by judges (Rev. Stat. 5499 (1878 ed.)), or by Members of Congress (Rev. Stat. 5500 (1878 ed.)). See also 18 U.S.C. (1952 ed.) 204-207 (bribery of and acceptance of bribes by Members of Congress and judges).

[20] Section 5451 proscribed the promise or offer of a bribe to "any person acting for or on behalf of the United States," while Section 5501 prohibited such persons from asking for or accepting a bribe.

person (§ 202, 62 Stat. 691).[21] These amendments were prompted by *United States* v. *Strang*, 254 U.S. 491, 493 (1921), which had held that a federal conflict of interest statute did not apply to a person employed by a government-owned and controlled corporation because the corporation was "a separate entity" from the United States government. The committee reports on the 1948 legislation make clear Congress' unequivocal intent that the bribery statutes should be applied to any and all persons acting on behalf of the burgeoning Executive Branch of the United States government (H.R. Rep. No. 304, *supra*, at A14-A15; H.R. Rep. No. 152 (Pt. 2), *supra*, at A12):

> When Congress enacted [these statutes] as a part of the 1909 Criminal Code, the present ramifications of the executive branch were not foreseen, and, consequently, the language proved inadequate to cover every new agency as indicated by the holding in the *Strang case*. Since then the growth of agencies, independent establishments, and Government-owned or controlled corporations has been phenomenal. It is the purpose of the inserted language to further what appeared unquestionably to be the intent of Congress, namely, to cover all persons acting for the United States Government in an official function.

The steady expansion of federal activity since the passage of the first bribery statute in 1790 also resulted in the enactment of other bribery statutes. The various statutes were not always harmonized with each other and they came to possess "unnecessary duplication[s]" as well as "omissions and loopholes." *Staff Report*, *supra*, at 70. The 1952 edition of Title 18 of the United States code contained 23 sections dealing generally with bribery and graft. 18

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[21] The 1948 amendments extended the language of former Section 39, 35 Stat. 1096, by "inserting words 'or any department or agency thereof', and by substituting words 'such department or agency' for 'department or office of the Government thereof'" (H.R. Rep. No. 304 *supra*, at A14). Section 117, 35 Stat. 1109, was amended by substituting the words "or agency thereof" for "or office of the Government thereof" (H.R. Rep. No. 304, *supra*, at A15). The purpose behind the amendment of Section 117 was to clarify the intent of Congress "to include within its scope all government bodies" (*ibid.*).

U.S.C. 201-223.[22] In 1961, President Kennedy, acting on the basis of the report of his specially appointed Advisory Panel on Ethics and Conflict of Interest in Government, sent a message to Congress calling for a revision of the laws governing conflicts of interest among public officials. Special Message to the Congress on Conflict-of-Interest Legislation and on Problems of Ethics in Government, Pub. Papers 326 (Apr. 27, 1961), *reprinted in* 107 Cong. Rec. 6835 (1961). Although the President's message did not include an explicit request for revision of the bribery laws, Congress took the opportunity to consolidate the "scraps and rag tags" of federal bribery law into a single, comprehensive statute. Special Committee on the Federal Conflict of Interest Laws, Ass'n of the Bar of the City of New York, *Conflict of Interest and Federal Service* 19 n.12 (1960).

The result of Congress' efforts in 1962 is the statute at issue in this case, 18 U.S.C. 201. The objective of the legislation was to bring uniformity and simplicity to the federal law of bribery, without "restrict[ing] the broad scope of the [prior] bribery statutes as construed by the courts." S. Rep. No. 2213, 87th Cong., 2d Sess. 4 (1962). To accomplish this objective, Congress spoke comprehensively. The term "public official" was "broadly defined to mean Member of Congress, any officer or employee of or person acting for or on behalf of the United States in an official function" (H.R. Rep. No. 748, 87th Cong., 1st Sess. 15 (1961); S. Rep. No. 2213, *supra*, at 7-8; 108 Cong. Rec. 21980-21983 (1962) (remarks of Sen. Kefauver)). The phrase "person acting for or on behalf of the United States" was, in turn, given a "comprehensive definition" (H.R. Rep. No. 748, *supra*, at 17): the phrase includes "within the statutory coverage those persons who perform activities for the Government,

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[22] According to a congressional staff report, "[n]ine sections * * * prohibit[ed] in general terms the bribery of Government employees, Members of Congress, judges and judicial officers (including jurors), and witnesses," while the rest of the 23 sections dealt with variations of bribery and conflicts of interest with respect to specific government employees (United States attorneys, marshals, revenue officers, customs officials, and banking officers). *Staff Report*, *supra*, at 65-66; footnotes omitted.

as, for example, through a contractual arrangement" (*id.* at 17-18).

The breadth of the new bribery statute's definition of "public official" was not the product of inadvertance; Congress specifically debated whether to retain the expansive phrase "any person acting for or on behalf of the United States" in Section 201(a). Prior to 1962 several bills[23] were proposed which would have narrowed the definition of "public official" to include only "an officer, agent, or employee of the United States in the executive, legislative, or judicial branch of the Government, or of any agency" (*Staff Report, supra,* at 74). The Department of Justice specifically opposed this narrow definition.[24] Congress heeded the Department's objections and adopted H.R. 8140, 87th Cong., 1st Sess. (1961), which carried forward the definitional phrase applying the bribery statute to persons "acting for or on behalf of the United States." 18 U.S.C. 201(a). The bill that eventually became 18 U.S.C. 201 was described in testimony before the Senate as a "comprehensive statute applicable to all persons performing activities for or on behalf of the United States." *Conflicts of Interest: Hearing on H.R. 8140 Before the Senate Comm. on the Judiciary,* 87th Cong., 2d Sess. 22 (1962) (statement of Deputy Attorney General Katzenbach).

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[23] H.R. 3411, 87th Cong., 1st Sess. (1961); H.R. 2156, 86th Cong., 1st Sess. (1959); H.R. 12547, 85th Cong., 2d Sess. (1958).

[24] Assistant Attorney General Nicholas deB. Katzenbach testified in hearings prior to the enactment of 18 U.S.C. 201(a):

> [t]he definition of "public official" * * * does not include any reference to persons "acting for or in behalf of the United States." This latter phrase appears in the existing law and we think its removal would be undesirable. Under the proposed definition it could be construed that under certain circumstances, a person acting in behalf of the United States would not be held to be an "officer, agent, or employee of the United States" as these terms are used in the bill. Persons acting in such a capacity should be protected from bribe offers (or punished for their acceptance).

*Federal Conflict of Interest Legislation: Hearings on H.R. 302, H.R. 3050, H.R. 3411, H.R. 3412, and H.R. 7139 Before the Antitrust Subcomm. of the House Comm. on the Judiciary,* 87th Cong., 1st Sess. 36 (1961).

The evolution of federal bribery law in general, and the legislative history of 18 U.S.C. 201(a) in particular, refute petitioners' assertions that their activities fall outside the scope of the statute. Contrary to petitioner Dixson's assertion (82-5279 Br. 12), 18 U.S.C. 201(a) does not define a "restrictive class of persons." Rather, the legislative history of the statute demonstrates that Congress' purpose was to speak expansively to cover all persons who exercise official power for or on behalf of the federal government. It would subvert that purpose to require Congress to add new language to the statute each time there is a delegation of power to administer federal programs and expend federal funds to new classes of persons who act for but are not officers of or employed by the United States.[25]

Petitioner Hinton's related argument, that only persons in an agency or direct contractual relationship with the United States can be said to be acting for or on its behalf (82-5331 Br. 7-15), must likewise be rejected. The legislative history of 18 U.S.C. 201(a) demonstrates that Congress considered but did not enact language limiting the statute to officers, agents and employees of the United States. Moreover, although the House committee report on 18 U.S.C. 201(a) mentions that the statute would cover persons performing activities for the government "through a contractual arrangement" (H.R. Rep. No. 748, *supra*, at

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[25] Nor should Congress be required, as petitioner Dixson suggests (82-5279 Br. 12-15), to specify in every statute delegating an official function that the delegee is subject to federal bribery law. The fact that 7 U.S.C. 84(d) expressly includes state and local grain inspectors as "public officials" within the reach of the federal bribery statutes does not evidence a congressional intent to permit other "persons acting for or on behalf of the United States" (18 U.S.C. 201(a)) to escape liability. As this Court recently noted in *Herman & MacLean* v. *Huddleston*, No. 81-680 (Jan. 24, 1983), slip op. 11 n.23 (quoting *SEC* v. *Joiner Corp.*, 320 U.S. 344, 350-351 (1943)), the maxim "expressio unius est exclusio alterius" must be "'subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose.'" The dominating, general purpose of 18 U.S.C. 201 is to deter and punish corruption in public service by all who exercise official power for or on behalf of the United States.

18), that relationship is used as an "example" (*ibid.*)—not as a definitional limit—of the coverage of the statute.[26]

2. There is a substantial consensus among federal district and appellate courts that persons carrying on activities authorized by statute, regulation, contract, or agreement as part of a federally sponsored and supervised program are "acting for or on behalf of the United States * * * in [an] official function" within the meaning of 18 U.S.C. 201(a). Contrary to the assertion of petitioner Hinton (82-5331 Br. 9), liability under 18 U.S.C. 201 and prior federal bribery statutes has not been limited to "factual situations involving officers and employees of the government."

In *United States* v. *Hollingshead*, 672 F.2d 751 (1982), the Ninth Circuit upheld the conviction under 18 U.S.C. 201(c) of the building service manager of the Los Angeles Branch of the Federal Reserve Bank of San Francisco. The evidence presented at trial showed that the de-

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[26] Significantly, the House Report on 18 U.S.C. 201(a) refers approvingly to *United States* v. *Levine*, 129 F.2d 745 (2d Cir. 1942), as an appropriate judicial construction of the phrase "person acting for or on behalf of the United States" (H.R. Rep. No. 748, *supra*, at 18). Despite petitioner Hinton's efforts to distinguish the case (82-5331 Br. 11-12), in many respects *Levine* presented a much less persuasive argument for the assertion of federal bribery jurisdiction than the present case. In *Levine*, the court of appeals held that an employee of the Market Administrator for the New York Metropolitan Milk Marketing Area was a "public official" within the meaning of the federal bribery statute. Although the Market Administrator was himself appointed by the Secretary of Agriculture, his employee, the defendant Levine, was neither appointed by the Secretary nor paid with federal funds. Rather, his services were paid for by funds obtained directly from the milk handlers in the area. Even more significantly, *Levine* makes it clear that although the Market Administrator was an agent of the State of New York, "that did not make him or his employees in their federal capacity any less subject to the criminal provisions regulating the conduct of persons acting on behalf of the United States" (129 F.2d at 748). Therefore, even though petitioners' direct employment or contractual relationship was with a private corporation, that fact alone does not insulate them from liability under 18 U.S.C. 201(c) "in their federal capacit[ies]" as administrators of federal funds (129 F.2d at 748).

fendant had received bribes and kickbacks to influence him in making purchase requisitions. The defendant argued that he could not be convicted under 18 U.S.C. 201(c) because, as an employee of a private banking institution, he was not a "public official" within the meaning of the bribery statute. The court of appeals rejected the argument, noting that the defendant's employment required him to "carry[ ] out tasks delegated by a government agency" (672 F.2d at 754). The federal reserve bank, moreover, was "clearly created for federal objectives," and was subject to "substantial federal government involvement through control by the Federal Reserve Board" (*ibid.*). In these circumstances, the court concluded that the defendant "was acting for or on behalf of the federal government" under 18 U.S.C. 201(a).

In *United States* v. *Mosley*, *supra*, the Seventh Circuit upheld the conviction under 18 U.S.C. 201(g) of a state employee with responsibility for determining eligibility for jobs funded under the federal Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. 801 *et seq.* The defendant, who had extracted payments in return for CETA job referrals, argued that as a state employee he was not liable under the federal bribery statute. The court of appeals disagreed. The federal government had retained extensive supervisory control over the locally administered CETA programs (659 F.2d at 815), and "[a]lthough [defendant] was a 'state employee' in the sense that he had been hired by the state, his salary and the entire cost of the program he administered were funded by the federal Government for federal objectives" (*ibid.*). The record also demonstrated that defendant successfully obtained employment for those paying the bribes, and he therefore "authoriz[ed] the expenditure of federal funds *himself*" (*id.* at 816; emphasis in original). Accordingly, the court concluded that the defendant "was acting 'on behalf' of the federal Government" and was subject to the prohibition of 18 U.S.C. 201 (659 F.2d at 816).

The federal bribery statute has also been applied to private employees charged with the performance of official governmental functions. In *United States* v. *Kirby*, 587 F.2d 876, 879-880 (7th Cir. 1978), the defendants were con-

victed for bribing two privately employed grain inspectors licensed by the United States Department of Agriculture under the United States Warehouse Act, 7 U.S.C. 252. The court of appeals rejected the contention that such inspectors were not "public officials" within the meaning of 18 U.S.C. 201(a), noting that "Congress intended the term 'public official' to be 'broadly defined'" (587 F.2d at 879 n.3, quoting S. Rep. No. 2213, *supra*, at 7). The court concluded that the inspectors "meet the definition of public official in 18 U.S.C. § 201(a) since they were acting 'on behalf of' the Department of Agriculture by issuing the certificates required by the Warehouse Act and its implementing regulations" (587 F.2d at 880).[27]

A predecessor to 18 U.S.C. 201 has been applied to defendants whose contracts of employment expressly provided that they were "not considered to be * * * Federal employee[s]." *Harlow* v. *United States*, 301 F.2d 361, 370-371 (5th Cir.), cert. denied, 371 U.S. 814 (1962). In *Harlow*, the court of appeals sustained the convictions of former European Exchange System (EES) employees who had solicited payments in return for allowing others to do business with the various EES post exchanges on military bases in Europe. Although the defendant's employment contracts specified that they were not federal employees, the court concluded that they were "at least 'persons acting for or on behalf of the United States' within the purview of [18 U.S.C. (1952 ed.) 202]" (301 F.2d at 370).[28] The court

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[27] The inspectors in *Kirby* were not licensed under the United States Grain Standards Act, 7 U.S.C. 71 *et seq.*, relied upon by petitioner Dixson (82-5279 Br. 12-18). Although the Grain Standards Act does provide (7 U.S.C. 84(d)) that inspectors licensed under the Act shall be deemed to be "persons acting for or on behalf of the United States" for purposes of 18 U.S.C. 201(a), the Warehouse Act licensing provisions (7 U.S.C. 252) contain no such specification. Thus, under petitioner Dixson's analysis (82-5279 Br. 12-18), the court of appeals in *Kirby* erroneously upheld the defendants' convictions.

[28] 18 U.S.C. (1952 ed.) 202 prohibited "an officer or employee of, or person acting for or on behalf of the United States, in any official capacity" from asking, accepting, or receiving any money with intent to influence "his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity."

reached this conclusion because the military post exchanges, operated by defendants, were "'arms of the Government deemed by it essential for the performance of governmental functions'" (*ibid.*, quoting *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485 (1942)).

These cases demonstrate that the reach of 18 U.S.C. 201(a) is extremely broad.[29] The courts, moreover, have never regarded an employment relationship as a talismanic test for the applicability of federal bribery law.[30] Indeed,

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[29] These cases are merely a sampling of instances where federal criminal jurisdiction has been exerted over persons "acting for or on behalf of the United States * * * in [an] official function" (18 U.S.C. 201(a)), even though the official had no direct employment relationship with the federal government. Numerous other cases have reached the same results in analogous factual settings. See, *e.g.*, *United States* v. *Levine*, *supra*, 129 F.2d at 747-748 (upholding the bribery conviction of an employee of the Market Administrator for the New York Metropolitan Milk Marketing Area, even though the employee was hired by the state and was not paid with federal funds); *United States* v. *Gallegos*, 510 F. Supp. 1112, 1113-1114 (D.N.M. 1981) (denying motion to dismiss indictment under 18 U.S.C. 201(b) of a state employee responsible for administering federal grants to homeowners under programs supervised by the Farmers Home Administration); *United States* v. *Griffin*, *supra*, 401 F. Supp. at 1230 (conviction under 18 U.S.C. 201(c) of an area management broker responsible for soliciting and receiving bids for rehabilitation of properties in a program sponsored by HUD); *United States* v. *Raff*, 161 F. Supp. 276, 279-281 (M.D. Pa. 1958) (denying motion to dismiss indictment under predecessor to 18 U.S.C. 201 of a partner in a private architectural engineering firm under contract with the Department of the Army to supervise construction at a military installation).

[30] For example, even though federal employees were not expressly included within the coverage of the 1873 and 1909 bribery statutes, this and other federal courts had no difficulty in concluding that such employees fell within the reach of the statutes as persons "acting for or on behalf of the United States" (Rev. Stat. 5451 (1878 ed.)). See *e.g.*, *United States* v. *Birdsall*, 233 U.S. 223, 228-231 (1914) (employees selected under the authority of the Secretary of the Interior to control liquor traffic among the Indians could be prosecuted under Section 117 of the Criminal Code of 1909 (35 Stat. 1109), where bribe was paid to influence official advisory function); *Felder* v. *United States*, 9 F.2d 872, 873-874 (2d Cir. 1925), cert. denied, 270 U.S. 648 (1926) (assistant United States Attorney comes within the purview of Section 39 of the Criminal Code of 1909 (35 Stat. 1096), where bribe was paid to influ-

this Court, in construing a predecessor to 18 U.S.C. 201, focused not on the existence of an employment relationship with the government but rather upon the nature of the official duties performed on behalf of the United States. *Krichman* v. *United States*, 256 U.S. 363 (1921). In *Krichman*, the Court concluded that petitioner could not be convicted for offering a bribe to a baggage porter contrary to Section 39 of the Criminal Code of 1909 (35 Stat. 1096), because the baggage porter was not performing an official function even though the railroad was under wartime control and the Court therefore assumed that the porter was a government employee (256 U.S. at 366-367).[31] Thus, the existence of a "contractual or agency relationship" (82-5331 Br. 5) with the federal government has never been the conclusive factor in determining whether a person is acting for or on behalf of the United States. Rather, as the above cases illustrate, and as petitioner Dixson correctly states (82-5279 Br. 15), the "phrase 'in any official function' * * * points the way to the meaning of 'acting for or on behalf of the United States.'"

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ence return of indictment); *United States* v. *Ingham*, 97 F. 935, 936 (E.D. Pa. 1899) (secret service operative employed by the Secretary of the Treasury comes within the terms of Rev. Stat. 5451 (1878 ed.) where bribe was paid to influence delegated law enforcement function).

[31] Contrary to the assertion of petitioner Hinton (82-5331 Br. 12-14), the Court in *Krichman* v. *United States*, *supra*, did not hold that the baggage porter was not acting for or on behalf of the United States; rather the Court concluded that the porter was not discharging an official function (256 U.S. at 365). The Court reasoned, in a manner fully consistent with the decision of the court of appeals below, that the bribery statute "aims to punish the attempted bribery or bribery of officials and those exercising official functions under or by the authority of a department or office of the Government. * * * It includes those, not officers, who are performing duties of an official character" (256 U.S. at 366). See also *In re Yee Gee*, 83 F. 145, 146-147 (N.D. Wash. 1897) (bribe paid to government translator did not fall within Rev. Stat. 5451 (1878 ed.) because it was not paid to influence translator's performance of his official functions); *United States* v. *Gibson*, 47 F. 833, 835 (N.D. Ill. 1891) (bribe offer to internal revenue officer in return for burning a distillery did not come within Rev. Stat. 5451 (1878 ed.) because the bribe was offered "for an act entirely outside the official function of the officer to whom [it was offered]").

Analyzed in light of the above cases, petitioners, in their roles as Executive Director and Housing Rehabilitation Coordinator of UNI, were unquestionably acting "for or on behalf of the United States * * * in [an] official function" (18 U.S.C. 201(a)). They were carrying out "tasks delegated by a government agency" (*United States* v. *Hollingshead*, *supra*, 672 F.2d at 754), in a program that was "clearly created for federal objectives" and was subject to substantial federal oversight and control (*ibid.*; *United States* v. *Mosley*, *supra*, 659 F.2d at 815). Although petitioners were private employees in the sense that they had been hired by UNI, their "salar[ies] and the entire cost of the program [they] administered were funded by the federal Government for federal objectives" (*United States* v. *Mosley*, *supra*, 659 F.2d at 815). Petitioners, moreover, solicited payments from various contractors in return for government-funded contracts, thereby "authorizing the expenditure of federal funds" (*United States* v. *Mosley*, *supra*, 659 F.2d at 816). In sum, unlike the porter in *Krichman* v. *United States*, *supra*, petitioners exercised official federal power in deciding what firms should benefit from a federal grant program funded by an act of Congress.

3. Petitioners rely on two cases from the United States Court of Appeals for the Second Circuit that impose a restrictive reading on the statute. *United States* v. *Del Toro*, 513 F.2d 656 (1975); *United States* v. *Loschiavo*, 531 F.2d 659 (1976). These cases are not supported by the language or legislative history of Section 201(a) and ignore the congressional mandate to construe the federal bribery statute broadly. See, *e.g.*, S. Rep. No. 2213, *supra*, at 4, 7-8; H.R. Rep. No. 748, *supra*, at 15, 17-18.

In *United States* v. *Del Toro*, *supra*, the court of appeals concluded that a city employee, who had the responsibility of locating office space for the federally funded Model Cities Program, was not a "public official" under 18 U.S.C. 201(a).[32] The court did not rest its conclusion on a finding that the city employee was not "acting for or on behalf of the United States" (513 F.2d at 662). Rather, the court

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[32] The city employee had been bribed in order to influence his selection of office space for the Model Cities program (513 F.2d at 659).

held that the employee was not acting "under or by authority of any * * * department, agency or branch" of the federal government (*ibid.*). The court noted that the bribed official "was a city employee, carrying out a task delegated to him by his superior, another city employee," and although a bribe had been paid to obtain a federally funded lease from the official, "[t]here were no existing committted federal funds for the purpose" (*ibid.*). The court disregarded the fact that federal funds paid 100% of the cost of the Model Cities Program, as well as 80% of its nonfederal administrators' salaries (*id.* at 661-662). Instead, the court relied on the rule of lenity and the fact that the federal conflict of interest statute, 18 U.S.C. 203, does not generally include state employees within its scope (513 F.2d at 662-663).

In *United States* v. *Loschiavo*, *supra*, the defendant bribed the same Model Cities administrator whose influence was sought in *Del Toro*, again to obtain a leasing arrangement. The defendant had not raised the issue of the administrator's "public official" status on direct appeal, but, following the *Del Toro* decision, filed a petition under 28 U.S.C. 2255 challenging his conviction on this ground (531 F.2d at 660-661). The court of appeals found that it was "bound by the holding in *Del Toro* on 'the key issue of the nature of [the administrator's] employment,'" and rejected the government's argument that the case was distinguishable from *Del Toro* because federal funds had actually been authorized for the *Loschiavo* lease (513 F.2d at 661). Without examining the legislative history of 18 U.S.C. 201(a) and without the citation of other authority, the court concluded (531 F.2d at 661):

> The type of public project involved, or the amount of federal funding entailed, may be important in applying [some] parts of the statute, such as the "official act" requirement of § 201(b)(1) or the "fraud * * * on the United States" requirement of § 201(b)(2), but for the purpose of deciding [a person's] status as a "public official" under § 201(a), it is not the aspects of the particular project which are of the greatest significance, but the character and attributes of his employment relationship, if any, with the federal government.

The United States believes that both cases were wrongly decided.[33] Neither the rule of lenity, the legislative history of 18 U.S.C. 201, nor the statutory analysis undertaken by the Second Circuit supports its crabbed interpretation of "acting for or on behalf of the United States" (18 U.S.C. 201(a)).

a. The rule of lenity, relied upon by the court of appeals in *Del Toro* (513 F.2d at 662) and invoked by petitioners in this Court (82-5279 Br. 19-20, 82-5331 Br. 12-15), does not justify that court's restrictive interpretation of the statute. The rule of lenity is merely "a[ ] guide to statutory construction" (*Callanan* v. *United States*, 364 U.S. 587, 596 (1961)), and is not applicable unless there is such a "grievous ambiguity or uncertainty in the language and structure of the Act" (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)) that even "[a]fter [a court has] 'seize[d] everything from which aid can be derived * * *' [it is still] left with an ambiguous statute." *United States* v. *Bass*, 404 U.S. 336, 347 (1971), quoting *United States* v . *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). Moreover, the rule of lenity "only serves as an aid for resolving an amibuity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, *supra*, 364 U.S. at 596. As the Court ob-

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[33] The United States Attorney's Manual states that *Del Toro* was "wrongly decided" and suggests that "whenever similar cases arise in other circuits, prosecution under section 201 is encouraged" (U.S. Attorney's Office, U.S. Dep't of Justice, *U.S. Attorney's Manual* 9-85.110 (1977)). Arguably, however, the city employee in *Del Toro* and *Loschiavo* may not have been discharging an "official [federal] function" (18 U.S.C. 201(a)) in leasing office space for the Model Cities Program since that task was apparently delegated by another city employee, not by statute, regulation, contract, or agreement with the federal government. The petitioners' administration of federal community development grants, however, which is authorized by statute, regulation, and contracts between the federal government, the City of Peoria and UNI, presents a much stronger case for application of 18 U.S.C. 201. See *infra* pp. 33-36.

served in *United States* v. *Moore*, 423 U.S. 122, 145 (1975), quoting *United States* v. *Brown*, 333 U.S. 18, 25-26 (1948):

> The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose * * *. Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.[34]

Contary to the apparent conclusion of the *Del Toro* court (513 F.2d at 662), there is no ambiguity in 18 U.S.C. 201(a) that justifies giving the statute an artificially narrow construction. As we have already explained, the language of Section 201(a) was chosen to insure that the bribery statute would *not* be restricted to employees, but would be "applicable to *all persons* performing activities for or on behalf of the United States" (H.R. Rep. No. 748, *supra*, at 17; emphasis added). Congress' clearly expressed choice should not be disregarded.

b. Neither the *Del Toro* nor the *Loschiavo* courts analyzed the legislative history of 18 U.S.C. 201(a). The court in *Del Toro*, however, purported to take a "broader look" at statutes "related" to 18 U.S.C. 201, and concluded that this endeavor supported its restrictive reading of Section 201(a) (513 F.2d at 662). The court noted that the federal conflicts of interest statute, 18 U.S.C. 203, applied to "special Government employees" and Congress had specifically delineated the circumstances under which state employees qualified as "special Government employees" under the statute (513 F.2d at 662-663). See, *e.g.*, 42 U.S.C. 246(f)(7)(A) (state officers or employees who are assigned to the Department of Health and Human Services without appointment are subject to 18 U.S.C. 203); 5 U.S.C. (& Supp. V) 3374 (state employees assigned or on detail to a federal government executive agency are deemed employ-

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[34] See also, *e.g.*, *United States* v. *Naftalin*, 441 U.S. 768, 778-779 (1979); *United States* v. *Culbert*, 435 U.S. 371, 379 (1978); *Scarborough* v. *United States*, 431 U.S. 563; 577 (1977); *Iannelli* v. *United States*, 420 U.S. 770, 789 (1975); *id.* at 795 (Douglas, J., dissenting); *id.* at 798 (Brennan, J., dissenting).

ees of the agency for purposes of 18 U.S.C. 203). The court reasoned that if Section 201(a) were given a broad reading, there would be no need for such statutes specifically including state employees within the reach of 18 U.S.C. 203 (513 F.2d at 663).

The fundamental error of this analysis is the court of appeals' failure to recognize that 18 U.S.C. 201 has a completely different structure from 18 U.S.C. 203 and the other conflict of interest provisions of the Code, 18 U.S.C. 202-209. Section 201 was designed as a comprehensive bribery statute applying a general proscription to *all* "public officials" as "broadly defined" in subsection (a) (S. Rep. No. 2213, *supra*, at 7). Sections 202-209, on the other hand, are designed to "balance the dual objectives of promoting government integrity and facilitating the government's recruitment and retention of needed personnel" (S. Rep. No. 2213, *supra*, at 7). The full prohibitions of Section 203 are, therefore, explicitly limited to "officers and employees" of the Executive, Legislative and Judicial branches (18 U.S.C. 203(a)); a lesser array of prohibitions are imposed on "special government employee[s]" (18 U.S.C. 203)). Given this structure, it is clear that further specification is necessary to clarify when state employees should be deemed to be covered by Section 203; and the fact that Congress has so specified has no implications for the general bribery statute, which comprehensively covers all persons who act in any official capacity for or on behalf of the United States.[35]

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[35] Indeed, Congress' decision to omit reference to Section 201—the "pure bribery" statute—in provisions rendering state employees subject to federal conflicts of interest law would reasonably indicate that the legislature believed that such employees were already covered by the broad definition of "public official" in Section 201(a), but not by the narrower provisions of Section 203 and related statutes.

The *Del Toro* decision has had a negative reception in Congress. The most recent version of the proposed Criminal Code Reform Act, S. 1630, 97th Cong., 2d Sess., §§ 1351-1352 (1982), would prohibit bribery and graft involving a "public servant," defined as including (*id.* at § 1351(c)(6)): "an agent of a State or local government charged by a federal statute, or by a regulation issued pursuant thereto, with administering monies or property derived from a federal program, and the official action or legal duty is related to the administration of such

### C. The Extent Of Federal Involvement In The Housing Program Administered By Petitioners Compels The Conclusion That They Are "Public Officials" Under 18 U.S.C. 201(a)

The extent of federal involvement in the housing rehabilitation program administered by petitioners under the Housing and Community Development Act of 1974 leads to the conclusion that petitioners were "acting for or on behalf of the United States * * * in [an] official function" (18 U.S.C. 201(a)) when they extracted payments in return for federally funded construction contracts. Although petitioners assert that federal involvement in UNI's housing rehabilitation program was insubstantial (82-5279 Br. 22-24; 82-5331 Br. 18-19) and argue that they performed no official functions in their roles as Executive Director and Housing Rehabilitation Coordinator (82-5279 Br. 25; 82-5331 Br. 19), the record in this case refutes these claims and fully supports the court of appeals' conclusion that petitioners were "public officials" within the meaning of Section 201(a). Petitioner Dixson's related contention that the court of appeals' construction of "public official" is unconstitutionally vague (82-5279 Br. 22) is likewise without merit.

1. Contrary to the assertion of petitioner Dixson (82-5279 Br. 17), the housing rehabilitation program administered by petitioners was not merely "a local project to accomplish local objectives." The congressional reports accompanying the legislation that became the Housing and Community Development Act of 1974, 42 U.S.C. (& Supp. IV) 5301 *et seq.*, demonstrate that the grant program created by the Act was intended to meet national housing objectives while at the same time simplifying the administration of federal funds (H.R. Rep. No. 93-1114, 93d Cong., 2d Sess. 6-7, 47 (1974), adopted in H.R. Conf. Rep. No. 93-1279, 93d Cong., 2d Sess. 123 (1974)):

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program." The Senate Report accompanying the legislation explains that the provision "is designed to overcome the holding in the *Del Toro* case" (S. Rep. No. 97-307, 97th Cong., 1st Sess. 432 (1981)). S. 1630 has not yet been reintroduced in the 98th Congress.

> The committee bill proposes an application and review procedure which has two basic purposes: first, that essential national goals and objectives, as developed over nearly three decades of Federal involvement in housing and community development, be retained and that communities be required to use block grant funds to achieve those objectives; and second, that the lengthy, burdensome, and generally frustrating process by which HUD approves applications for various community development grants be simplified to the greatest extent possible.
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> [The purpose of the Act is to further] the development of a national urban growth policy by consolidating various complex and overlapping assistance programs into a consistent system of Federal aid which * * * furthers achievement of the national goal of a decent home and a suitable living environment for every American family * * *.

The 1974 legislation sought to achieve these goals by maintaining close federal supervision over the expenditure of federal housing funds, while at the same time delegating substantial authority to state and local governments in the administration of those funds.[36]

As noted by petitioner Dixson (82-5279 Br. 16), Congress considered and rejected a proposal to distribute housing rehabilitation funds to the states "with absolutely no strings attached."[37] Instead, Congress adopted extensive application and review standards, and authorized the Secretary of HUD to promulgate regulations to insure that the grant program established by the Act would "provide communi-

[36] See also S. Rep. No. 93-693, 93d Cong., 2d Sess. 48 (1974) (adopted in H.R. Conf. Rep. No. 93-1279, *supra*, at 123) ("The existence of healthy urban communities * * * is essential to the Nation's welfare and requires expansion of public and private investment, sustained action by Federal, State and local governments, and improved program planning, implementation, and evaluation efforts").

[37] See S. Rep. No. 93-693, *supra*, at 2 (criticizing the automatic distribution of federal funds to cities "without proper regard to the use of such funds in carrying out national objectives specified in the [Housing and Community Development] Act").

ties with substantial latitude and flexibility to determine their particular needs and the range of activities they deem necessary to meet those needs, *without derogating from HUD's responsibility to assure that nationally-established objectives are being met in a reasonable manner*" (H.R. Rep. No. 93-1114, *supra*, at 8) (emphasis added). Although petitioner Dixson asserts that the resulting government control was "of the most general type" (82-5279 Br. 16), Congress clearly called for extensive "executive oversight of programs to insure that Federal funds are being used efficiently to achieve national objectives" (S. Rep. No. 93-693, *supra*, at 55). Thus, as the court of appeals below correctly concluded (J.A. 79), the delegation of authority to administer funds under the Act "was to streamline the funding process rather than to abdicate federal control over the substantive aspects of the [housing] program."

In accordance with this policy, the Housing and Community Development Act of 1974 and its implementing regulations provide a comprehensive scheme of federal supervision over the local administration of grant funds. Applicants under the Act are required to submit to the Secretary of HUD for federal approval a three-year comprehensive community development plan, a detailed program of implementation, and a housing assistance plan prior to the receipt of any funds. 42 U.S.C. (& Supp. IV) 5304. Activities that are eligible for funding under the grant program are set forth in great detail by the Act (42 U.S.C. (& Supp. IV) 5305), and annual performance reports are required to be submitted to determine compliance with the objectives of the Act (42 U.S.C. (Supp. IV) 5304(d); 24 C.F.R. 570.900-570.913). The Secretary of HUD has a right of access to all financial records of grantees and subgrantees (24 C.F.R. 570.509) and is directed to make reviews and audits on an annual basis. 42 U.S.C. (& Supp. IV) 5304(d), (g). Grant recipients are required to comply with federal equal opportunity, labor, safety, environmental, and other standards. 42 U.S.C. (& Supp. IV) 5304(h), 5309-5310; 24 C.F.R. 570.600-570.611. The Secretary of HUD, moreover, is authorized to terminate or limit funding for noncompliance with the requirements of federal law. 42

U.S.C. 5311; 24 C.F.R. 570.910-570.913. Significantly, the Act specifically contemplates the administration of grant funds by nonprofit corporations, like UNI, when such corporations are "designated by the chief executive officer of a State or a unit of general local government to undertake a Community Development Program in whole or in part" (42 U.S.C. 5302(c)). See also 24 C.F.R. 570.204.[38] Therefore, as the court of appeals properly concluded, "the statute, regulations, and legislative history manifest Congress' intent to promote efficient, effective federal supervision over the Community Development Block Grant program. The extent of federal involvement is such that Dixson and Hinton were acting on behalf of the United States in their administration of the federal funds under the program" (J.A. 79).

2. Petitioner Hinton protests that the holding of the court below is erroneous because, carried to its logical conclusion, "anyone acting in a federally funded program could be said to be 'a person acting for or on behalf of the United States'" (82-5331 Br. 22). This assertion ignores the fact that the court of appeals also analyzed petitioners' "positions within the [federally funded] program" (J.A. 80) in finding that they fell within the terms of Section 201(a). The decision below rests on petitioners' official status as administrators of federal grants.

Although petitioners could not be fired by HUD, their salaries and the entire cost of the UNI rehabilitation program were supported by HUD funds. These funds, moreover, could be terminated by HUD for noncompliance with the objectives of the Act. 42 U.S.C. 5311; 24 C.F.R. 570.910-570.913. Petitioners, furthermore, possessed and exercised the authority to award housing rehabilitation contracts, paid for with grant funds, to contractors who agreed to pay them a ten percent kickback (J.A. 80; see *supra* n.16). In these circumstances, petitioners "were acting as

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[38] Although a state or local government has "the choice of which local non-profit organization[s]" (82-5331 Br. 17) will administer a grant under the Act, those organizations must meet strict HUD eligibility standards. 42 U.S.C. 5302(c); 24 C.F.R. 570.204(a)(2).

federal agents in the sense of having discretion in administering the expenditure of federal funds" (*ibid.*).

Petitioners, in short, were not just "anyone acting in a federally funded program" (82-5331 Br. 22). Rather, as petitioner Dixson correctly states, they were "person[s] whose salar[ies] [were] derived from Federal funds and who ha[d] some influence in the dispersal of Federal funds" (82-5279 Br. 25). On these facts, the court of appeals properly found that petitioners were "acting for or on behalf of the United States * * * in [an] official function" (18 U.S.C. 201(a)).

3. Petitioner Dixson suggests that the lower court's construction of "public official" under 18 U.S.C. 201(a) is unconstitutionally vague (82-5279 Br. 22). This contention is insubstantial.

A statute may be found to be unconstitutionally vague if it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," or if it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis" (*Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972)). Section 201(a) suffers from neither infirmity, as it "provides sufficient notice of the type of conduct it prohibits" and "is susceptible of consistent judicial interpretation." Comment, *The Federal Bribery Statute: An Argument for Cautious Revision*, 68 Ky. L.J. 1026, 1029 (1980).

Section 201(a), to be sure, defines "public official" in broad terms. Persons of ordinary capacity and intelligence, however, can certainly determine when they are "acting for or on behalf of the United States * * * in any official function" (18 U.S.C. 201(a)). A criminal law is "not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree." *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, 223 (1914).[39] The court of

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[39] Petitioners, moreover, cannot plausibly claim that they were surprised by the application of federal criminal law to their activities. UNI's proposal to the City of Peoria was to achieve the goals "set forth in the Housing and Community Development Act" (Gov't Exh. 19 at 2), and the amended grant agreement between the city and UNI expressly

appeals' construction of Section 201(a), moreover, is straightforward and can be readily and consistently applied to divergent factual circumstances. In essence, the court below analyzed (1) the extent of federal involvement in the community development block grant program and (2) petitioner's roles in administering that program (J.A. 78-80). As we have already shown, this approach has also been adopted by most other federal district and appellate courts. Far from creating a "nightmare" for "attorneys, defense lawyers and trial judges" (82-5279 Br. 24), the court below has construed the terms of Section 201(a) in accordance with its plain meaning and in a manner that is consistent with the weight of existing precedent.

### D. The Federal Government Has A Strong And Legitimate Interest In Prosecuting Petitioners For Their Misuse Of Government Funds

Relying on general notions of comity and federalism, petitioners assert that they do not fall within Section 201(a)'s definition of "public official" because it "would be presumptuous of Congress to draft legislation that intrudes into the area of State criminal law" (82-5279 Br. 22; see also 82-5331 Br. 14-15). This argument ignores the strong federal interest in prosecuting petitioners for their corrupt administration of federal funds.

In 1948, Congress expanded the ambit of federal bribery law in express recognition of the "phenomenal" growth of "agencies, independent establishments, and government-owned or controlled corporations" employing persons that performed official governmental functions traditionally discharged by federal officers and employees (H.R. Rep. No. 304, *supra*, at A14-A15; H.R. Rep. No. 152 (Pt. 2), *supra*, at A12; see also Reviser's Notes, 18 U.S.C. (1952 ed.) 201). The burgeoning development of federal grants-in-aid pro-

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provided the UNI would comply with a broad range of federal laws, including wage and safety standards, equal employment opportunity requirements, and the Copeland Anti-Kickback Act (J.A. 71-72). Petitioners' knowledge of these requirements, as well as their certain knowledge of the source of UNI's funding, was surely adequate to put them on notice that they were "acting for or on behalf of the United States" (18 U.S.C. 201(a)).

grams since that time has resulted in further delegation of governmental authority to the states and numerous other local entities. The Office of Management and Budget has reported that (Circular No. A-102, *reprinted in* 45 Fed. Reg. 21836, 21840 (1980)):

> Federal financial assistance to State and local governmental and other non-Federal domestic organizations has increased from $3 billion in fiscal year 1955 to $90 billion for fiscal year 1980. This assistance is provided through a network of over 1,100 programs administered by 52 Federal departments, agencies, and commissions. The programs are carried out by 50 States, 3,000 counties, nearly 90,000 local governments, and innumerable nongovernmental organizations.

Housing and Community Development programs, like the one involved in the present case, received congressional authorizations of $3.65 and $3.8 billion for fiscal years 1979 and 1980, the period covered by petitioners' indictment. Pub. L. No. 95-128, § 103(a), 91 Stat. 1113; see H.R. Conf. Rep. No. 95-634, 95th Cong., 1st Sess. 46 (1977); H.R. Rep. No. 95-236, 95th Cong., 1st Sess. 3, 32 (1977). Funding for Housing and Community Development programs is projected to reach $4.11 billion in fiscal year 1983. Pub. L. No. 96-399, § 103(a)(1), 94 Stat. 1618; see H.R. Conf. Rep. No. 96-1420, 96th Cong., 2d Sess. 6, 77 (1980).

There is no substance to the argument that it is inappropriate to apply federal (rather than state) criminal law to prevent and punish corruption in the distribution of federal funds pursuant to a federal program; the fact that state and local officials (and private persons) participate in the distribution of those funds and the administration of that program does not justify the conclusion that they should be insulated from the federal criminal law. The purpose of the federal bribery statute is to assure that federal governmental powers are exercised honestly and are not corrupted by inducements for private gain. The power to determine who shall be given federal money to rehabilitate houses under a federal housing program is an important federal governmental power. It is critically important to the success of the federal program that this power to choose among applicants for these possibly lucrative rehabilitation contracts not be

corrupted by bribery. It is therefore preposterous to suggest that reading a broad federal criminal statute naturally to encompass this important federal purpose would somehow represent an undue intrusion upon the criminal jurisdiction of the states.[40] As the district court noted in *United States* v. *Gallegos*, 510 F. Supp. 1112, 1113-1114 (D.N.M. 1981):

> the United States, not the [state] is harmed by the improper influence allegedly exerted * * * in connection with the * * * grant program. There is no reason to think that Congress would not intend such an injury to be punishable under federal law.[41]

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[40] Indeed, it is not entirely clear that petitioners, as officers of UNI, could be prosecuted under the Illinois bribery statute, which by its express terms applies only to the bribery of or receipt of bribes by "any public officer, public employee, juror or witness." Ill. Ann. Stat. ch. 38, § 33-1(d), (e) (Smith-Hurd Cum. Supp. 1982). A "public officer" is defined by statute as "a person who is elected to office pursuant to statute, or who is appointed to an office which is established, and the qualifications and duties of which are prescribed, by statute, to discharge a public duty for the State" (Ill. Ann. Stat. ch. 38, § 2-18 (Smith-Hurd Cum. Supp. 1982)), while a "public employee" is defined as a "person, other than a public officer, who is authorized to perform any official function on behalf of, *and is paid by*, the State or any of its political subdivisions" (Ill. Ann. Stat. ch. 38, § 2-17 (Smith-Hurd Cum. Supp. 1982) (emphasis added). The single reported state case construing these legislative definitions demonstrates that the reach of the state bribery statute is not as extensive as the federal statute. *People* v. *Drish*, 24 Ill. App. 3d 225, 228-229 (1974) (member of city planning commission is a "public officer" because the commission discharged a public duty and the commission as well as the qualifications of its members are established by statute).

[41] In an analogous context, this Court has applied the federal fraud statute to contractors who submitted collusive bids on state projects funded by the federal government. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 544 (1943). The Court rejected the claim that the federal fraud statute did not apply because the federal funds were channelled through the state government and respondents therefore lacked "a direct contractual relationship" with the United States (317 U.S. at 541). The Court noted that "Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. * * * These funds are as much in need of protection from fraudulent claims as any other federal money, and the statute does not make the extent of their safe-

Similarly, there is no strong reason why the burden of preserving the integrity of the distribution of federal funds pursuant to federal programs should be placed on understaffed local law enforcement authorities. The responsibility of guaranteeing the integrity of federal programs rests on the federal government.

## CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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guard dependent upon the bookkeeping devices used for their distribution. * * * The fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary" (*id.* at 544; footnote omitted). By a parity of reasoning, petitioners in this case should be held liable for their acceptance of bribes because, although they were private employees of UNI, they were nevertheless administering the distribution of federal funds and "bookkeeping devices used for their distribution" (317 U.S. at 541) should not determine whether petitioners were "acting for or on behalf of the United States * * * in [an] official function" (18 U.S.C. 201(a)).